Supreme Court, U.S.
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No. 97-650

In the Supreme Court of the United States

OCTOBER TERM, 1997

DALLAS MORNING NEWS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

SEAN CONNELLY
Special Assistant to the Attorney General

DOUGLAS N. LETTER
JEFFRICA JENKINS LEE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the district court properly denied petitioner's request for access to the sealed portions of certain documents filed in connection with pretrial proceedings in a criminal case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 119 F.3d 806. Opinions of the district court (Pet. App. 23-54, 55-124, 130-150) are reported at 918 F. Supp. 1452, 940 F. Supp. 1541, and 169 F.R.D. 362, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1997. The petition for a writ of certiorari was filed on October 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the criminal prosecution brought by the United States against respondents Timothy James McVeigh and Terry Lynn Nichols, who were charged with eleven capital counts in connection with the April 19, 1995, bombing of the Murrah federal building in Oklahoma City, Oklahoma.[1] In late 1995, various news organizations sought access to certain documents that the parties had filed and the district court had sealed. In January 1996, the district court issued an order setting out the criteria it would use to determine whether material would be kept under seal or made available to the public. Pet. App. 23-54.

In its January 1996 opinion, the district court recognized that there is a "public interest in obtaining information concerning the progress of this criminal proceeding." Pet. App. 26. It acknowledged that "[p]apers filed with the court, records of court activity, exhibits received at hearings and trials and orders and judgments entered by the court are all records normally accessible by the press and public." *Id.* at 41. The district court noted that the common-law right of access to such documents is "subject to the supervisory power of each court to limit access to protect other interests and * * * that the decision as to access is 'one best left to the sound discretion

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[1] The indictments against McVeigh and Nichols were returned in August 1995, in the Western District of Oklahoma, but the case was transferred to the District of Colorado for trial. See *United States* v. *McVeigh*, 918 F. Supp. 1467 (W.D. Okla. 1996). McVeigh and Nichols were tried separately, and both were found guilty. McVeigh has been sentenced, and Nichols presently awaits sentencing.

of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.'" *Ibid.* (quoting *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 599 (1978)).

Relying on *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), the district court also recognized that the First Amendment provides a qualified right of access to criminal proceedings, which can "be overridden when closure is essential to preserve higher values and is narrowly tailored to serve that interest." Pet. App. 44. In the circumstances of the present case, the district court concluded, the question whether there was a common-law or First Amendment right of access could properly be resolved through application of the standards articulated in *Press-Enterprise II*. *Id.* at 45. The district court therefore held that media motions to open sealed documents would be determined by the answers to the following questions:

> Does the matter involve activity within the tradition of free public access to information concerning criminal prosecutions? Will public access play a significant positive role in the activity and in the functioning of the process? Is there a *substantial probability* that some recognized interest of higher value than public access to information will be prejudiced or affected adversely by the disclosure? Does the need for protection of that interest override the qualified First Amendment right of access? Is the closure by the court essential to protect that interest, considering all reasonable alternatives?

Ibid.

2. Petitioner and other media representatives sought access to three categories of material sealed in whole or in part by the district court: (1) Nichols' May 1996 motion to suppress certain evidence, and exhibits to that motion; (2) Government Exhibit 72 (the notes of an FBI agent concerning his interview of Nichols a few days after the bombing in April 1995), which was considered by the district court during a June 1996 hearing on Nichols' motion to suppress evidence;[2] and (3) documents filed in September 1996 by the parties in connection with the motions made to sever the trials of McVeigh and Nichols. Pet. App. 2-3, 55-57, 126-129, 131. Respondents McVeigh and Nichols opposed disclosure. In August and October 1996, the district court issued orders declining to unseal the sealed portions of the documents, applying the standards enunciated in the January 1996 order. *Id.* at 55-56, 125, 126-129, 131.[3] Petitioner and

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[2] The FBI agent's notes were introduced as evidence in the Nichols trial and thus have now become part of the public record.

[3] As to the motion to suppress, and the attached exhibits, the district court declined to unseal the unredacted versions of those documents because "they include references and attachments describing facts which are not now and may never be in evidence[.] * * * If that material were now made public, it would likely generate pretrial publicity prejudicial to the interests of all parties in this criminal proceeding. The bases for the rulings [on the motion to suppress] are fully disclosed in this memorandum opinion." Pet. App. 55-56. As to Exhibit 72, the district court explained that it was "sealed for the same reasons * * * already articulated with respect to some of the other parts of these motions that are sealed[.] So it's sealed until some further stage of the proceeding, if it arises, when it can be unsealed." *Id.* at 128-129. Finally, as to the pleadings and exhibits submitted in connection with the motions to sever,

other media representatives filed two separate notices of appeal, and the court of appeals subsequently consolidated those cases. Pet. C.A. Br. 3.

3. The court of appeals affirmed. Pet. App. 1-22. The court first considered the basis of its jurisdiction. It rejected petitioner's argument that the court had jurisdiction under the collateral order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Pet. App. 7. Rather, the court held, petitioner and the other media representatives could obtain review of the district court's order by way of a petition for a writ of mandamus. *Id.* at 8-9. Treating filings by petitioner and the other media representatives as a petition for a writ of mandamus, *id.* at 7 n.4, the court took jurisdiction over the case and decided it on the merits.

On the merits, the court of appeals "assume[d] without deciding that access to judicial documents is governed by the [First Amendment] analysis articulated in *Press-Enterprise II*." Pet. App. 14. The court explained that *Press-Enterprise II* requires a two-part inquiry: "(1) whether the document is one which has historically been open to inspection by the press and the public; and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* at 14-15 (quoting *Press-Enterprise II*, 478 U.S. at 8).

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the district court ruled that those materials included information that would not be admissible against McVeigh, and "statements of appraisal[] by counsel of their view of the evidence and the effect of the evidence." *Id.* at 127. See also *id.* at 131.

Before reviewing the district court's application of the *Press-Enterprise II* standard to the documents at issue in the present case, the court of appeals emphasized that the district court's orders must be viewed in "the extraordinary context of this case as a whole. A high-profile case such as this imposes unique demands on the trial court, and requires the court to establish procedures for dealing effectively, efficiently and fairly with recurring issues such as whether documents should be placed under seal or redacted." Pet. App. 15. The court of appeals noted that the district court's January 24, 1996 order set forth such a procedure and that that order "apparently has not been challenged" by the media. *Ibid.* The court concluded that the January 24, 1996 order "carefully discussed the relevant constitutional concerns, and the district court referred back to that order in its subsequent orders sealing the documents at issue here." *Ibid.*[4]

The court of appeals then held that the district court's orders declining to unseal the disputed portions of the documents at issue were consistent with the *Press-Enterprise II* standards. Pet. App. 15-22. With regard to the redaction of the suppression motion papers, the court ruled that, at least where

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[4] In the court of appeals, the government stated that, generally speaking, the district court had articulated the correct standards for evaluating the sealing of the records at issue, but that the material could remain sealed only if specific conditions were met, which required further explanation and detailed findings by the district court. Gov't C.A. Br. 11. The government did not oppose unsealing, but expressed the view that it would be appropriate first to allow the district court an opportunity to decide whether the findings needed to support the sealing orders could and should be made. *Id.* at 17-18.

"the public is able to understand the circumstances that gave rise to the decision to suppress," the First Amendment right of access does not extend to evidence actually suppressed at the suppression hearing. *Id.* at 16-17. The court pointed out that the district court "only sealed those portions of the motion and exhibits that contain materials, or excerpts from materials, ruled inadmissible in the McVeigh trial." *Id.* at 17. The court explained that sealing that material "was necessary to protect the integrity of the order that the statements at issue constituted inadmissible hearsay or were otherwise inadmissible." *Ibid.* Moreover, because the district court "held a four-day long public suppression hearing, issued a publicly available order, and made available to the public redacted versions of the motions to suppress and attached exhibits[,] * * * both the press and the public had ample opportunity to understand the circumstances surrounding Nichols' statements, and the reasons why those statements were deemed inadmissible against McVeigh." *Ibid.* Thus, the court of appeals concluded, the district court's sealing order "was consistent with any First Amendment or common law rights of access." *Ibid.*

Similarly, the court concluded that the district court properly declined to unseal Government Exhibit 72, handwritten notes taken by an FBI agent during the interview of Nichols. Pet. App. 18. Because the notes consisted entirely of hearsay statements that the district court concluded would not be admissible at the McVeigh trial, unsealing of the notes "would have the deleterious effect of making publicly available incriminating evidence that the district court has ruled may not be considered in assessing [McVeigh's] guilt." *Ibid.* Moreover, the court of

appeals explained, as with the suppression motion and its related documents, the press and public had ample opportunity to understand the general nature of and circumstances surrounding Exhibit 72 through attending the public suppression hearing or reading the publicly available transcripts of that hearing. *Ibid.*

Finally, with respect to the severance motions and related documents, the court of appeals held that the district court, in redacting the severance motions, properly balanced the media's First Amendment interests against the right of respondents McVeigh and Nichols to a fair trial. Pet. App. 18. The court of appeals explained that McVeigh and Nichols had a strong interest in shifting blame to each other and in trying to persuade the trial court that their defenses were mutually antagonistic. *Id.* at 18-19. According to the court of appeals, such a showing required respondents' counsel to discuss candidly their trial strategies and the strengths and weaknesses of their respective cases. *Id.* at 19. The court of appeals further noted that the district court believed that substantial redaction was necessary to avoid chilling the sort of candor needed to assess whether separate trials should be ordered. *Ibid.* The court stated that, "[p]articularly in light of the abuse of discretion standard applicable to this mandamus action, we decline to second-guess the district court's conclusion on the record before us." *Ibid.*

The court of appeals also determined that the district court made adequate findings to support its sealing orders and that the orders "were narrowly tailored to the compelling fair trial interests at stake." Pet. App. 20-21. After *in camera* review of the sealed and redacted materials, the court of appeals

concluded that the district court "properly sealed only those portions of the documents at issue necessary to protect, respectively, the integrity of suppressed evidence and the [respondents'] ability to argue effectively that separate trials were warranted." *Id.* at 21-22. The court of appeals also pointed out that the district court left open the possibility that further disclosures might be appropriate at some later point in the proceedings should the balance of interests change. *Id.* at 22. The court therefore concluded that "the substantial portions of the documents that were made publicly available have provided the press and the public with a constitutionally sufficient opportunity to understand the decisions at issue." *Ibid.*

ARGUMENT

In deciding the merits of petitioner's claim of a First Amendment right of access to the sealed materials at issue in the present case, the court of appeals and the district court both applied the standards set forth by this Court in *Press-Enterprise II*, *supra*. Although petitioner claims that the district court and the court of appeals erred in their application of those standards to the unusual circumstances of the present case, that case-specific claim of error does not merit this Court's review. Nor is review warranted to resolve the conflict among the courts of appeals on the question whether orders denying public access to court proceedings or documents are reviewable by direct appeal under the collateral order doctrine or instead by petition for a writ of mandamus. Even assuming that the conflict on this narrow procedural question might otherwise merit this Court's attention in an appropriate case,

the present case is not a suitable vehicle to address the conflict, because resolution of the conflict would not affect the proper disposition of the case.

1. Petitioner contends that this Court should grant certiorari to decide "whether the First Amendment right of access extends to documents filed in connection with criminal pretrial proceedings." Pet. 9. The court of appeals did not decide that issue, and there is no conflict among the courts of appeals on the issue. Under the circumstances, further review of the issue by this Court is unwarranted.

The court of appeals correctly acknowledged that "[a] number of circuits have concluded that the logic of *Press-Enterprise II* extends to at least some categories of court documents and records, such that the First Amendment balancing test there articulated should be applied before such qualifying documents and records can be sealed." Pet. App. 11-12 (citing cases). Noting that it had not previously decided whether the *Press-Enterprise II* standards applied to requests for access to court documents, the court of appeals concluded that it need not decide that issue to resolve the present case. *Id.* at 12. Rather, the court of appeals "assume[d] without deciding that access to judicial documents is governed by the analysis articulated in *Press-Enterprise II*," and upheld the ruling of the district court on that assumption. *Id.* at 14.

Petitioner asserts that the court of appeals' "refusal to decide whether there is—or is not—a First Amendment right of access to documents filed in connection with criminal proceedings constitutes a clear conflict with the majority of the courts of appeals that have recognized such a right." Pet. 14. The decision of the court of appeals to reserve ruling

on the question, however, in no way conflicts with decisions of other courts of appeals that had resolved the question.

Nor is there any other reason for the Court to grant review to consider the question whether there is a general First Amendment right of access to court documents filed in connection with pretrial criminal proceedings. The courts of appeals to have decided the question have concluded that there is such a general First Amendment right. Pet. App. 11-12 (citing cases).[5] The court of appeals in this case assumed as much, but denied petitioner relief on the ground that, under the standards established in *Press-Enterprise II*, the First Amendment did not require the unsealing of the particular documents at issue. *Id.* at 14-22. Thus, petitioner would not benefit from a ruling by this Court to the effect that there is a general First Amendment right of access to court documents filed in connection with pretrial criminal proceedings. Further review of that issue by this Court is therefore not warranted.

2. Petitioner also asks this Court to grant review to correct what it claims was an erroneous application of the *Press-Enterprise II* standards to the circumstances of the present case. Pet. 21-25. The case-specific claim that the lower courts have mis-

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[5] As the court of appeals emphasized in the present case, however, "in not all of [the cases recognizing a qualified First Amendment right of access] did the court ultimately conclude that these records had to be made available to the public after the balancing test was applied." Pet. App. 11-12 (citing, *inter alia*, *In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988) (affirming order to seal affidavits accompanying search warrants); *United States* v. *Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (affirming order to seal portion of plea agreement)).

applied a correct legal standard is generally not a sufficient basis for granting a writ of certiorari. See *Ross* v. *Moffitt*, 417 U.S. 600, 616-617 (1974) ("This Court's review * * * is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); see also *NLRB* v. *Mexia Textile Mills*, 339 U.S. 563, 573 (1950) (Frankfurter, J., dissenting) (volume of federal case law "preclude[s] the grant of certiorari in cases, however erroneously decided below, in which the incidence of error was too small compared with the drain that their consideration would make on the thought and energy demanded of this Court by the cases which inevitably belong here").

Granting review to consider petitioner's case-specific claims would be particularly inappropriate in the present case, for two reasons. First, as the court of appeals emphasized, the circumstances of the present case are quite unusual. Pet. App. 15 ("In evaluating the district court's orders regarding these particular documents, it is important to bear in mind the extraordinary context of this case as a whole."). Second, even if the rulings of the district court and the court of appeals were in error, review by this Court is not necessary to cure the error. As we have already noted, one of the documents at issue in the present case has already been made public. See note 2, *supra*. Moreover, both respondents have now been tried and found guilty. The district court and the court of appeals both emphasized that "at some later point in the proceedings the balance of interests could change, and that further disclosures might be appropriate at such time." Pet. App. 22. There is good reason to believe, therefore, that petitioner would be able to obtain access to the documents at

issue in the present case if it were to renew its request that those documents be unsealed.[6]

3. Petitioner contends that the court of appeals, in applying the *Press-Enterprise II* standards, decided two important constitutional issues that should be addressed by this Court. Pet. 21-25. First, petitioner contends that the court of appeals adopted a categorical rule that "so long as the public has had access to hearings, the public need not view the documents critical to those hearings." Pet. 22. The court of appeals adopted no such rule. Rather, it concluded that, in the particular circumstances of the present case, the sealed documents at issue were not necessary to permit the press and the public to have an adequate understanding of the pretrial proceedings and the rulings of the district court. Pet. App. 16-19. As the court of appeals explained, those circumstances were not limited to the fact that the pertinent pretrial proceedings themselves were open to the press and public. Rather, they included the additional facts that redacted versions of the documents were made available and that the district court's orders provided detailed information about the bases of the court's rulings. *Id.* at 17, 21. Petitioner does not assert that the court of appeals' resolution of this issue conflicts with any decision of this Court or of any other court of appeals, and the court of appeals'

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[6] In the court of appeals, the government took the position that the orders of the district court were not supported by detailed findings of the kind necessary to support a denial of access to the documents at issue, and that the case should be remanded for the district court to determine whether such findings could properly be made. Gov't C.A. Br. 16-18. Notwithstanding that position, for the reasons stated in text, further review by this Court is not merited.

case-specific conclusion does not merit this Court's further review.

Second, petitioner contends that the court of appeals adopted a categorical rule that there is no First Amendment right of access to evidence that is inadmissible. Pet. 24-25. Although the opinion of the court of appeals contains language that might be read to support such a contention, see Pet. App. 17-18, we do not understand the holding of the court of appeals to be so categorical. In concluding that petitioner was not entitled to access to the sealed materials in the present case, the court of appeals did not rely solely on the fact that some of the sealed materials contained inadmissible evidence. Rather, the court of appeals emphasized that its holding was supported by a number of additional factors, including that the sealed materials were not necessary to permit the press and public to understand the pretrial proceedings and the district court's pretrial rulings, *id.* at 17-18, 21, and that disclosure of the sealed materials would have undermined the "compelling fair trial interests at stake," *id.* at 21. Again, petitioner does not assert a conflict, and the case-specific ruling below does not warrant further review.

4. Petitioner correctly notes that the courts of appeals have reached conflicting conclusions on the question whether orders denying public access to court proceedings or documents are reviewable by direct appeal under the collateral order doctrine or instead by petition for a writ of mandamus. Seven courts of appeals have held that such orders are immediately appealable under the collateral order doctrine. See *In re New York Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987); *In re NBC, Inc.*, 828 F.2d 340, 343 (6th Cir. 1987); *In re Reporters Committee for*

Freedom of the Press, 773 F.2d 1325, 1330 (D.C. Cir. 1985); *Newman* v. *Graddick*, 696 F.2d 796, 800 (11th Cir. 1983); *United States* v. *Dorfman*, 690 F.2d 1230, 1231-1232 (7th Cir. 1982); *United States* v. *Cianfrani*, 573 F.2d 835, 845 (3d Cir. 1978); *United States* v. *Gurney*, 558 F.2d 1202, 1207 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978). The Tenth Circuit and two other courts of appeals, however, have held that such orders are reviewable only by way of petition for a writ of mandamus. See *Seattle Times Co.* v. *United States Dist. Court*, 845 F.2d 1513, 1515 (9th Cir. 1988); *In re Washington Post Co.*, 807 F.2d 383, 388 (4th Cir. 1986); *Journal Publishing Co.* v. *Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986). Cf. *In re Globe Newspaper Co.*, 729 F.2d 47, 50 (1st Cir. 1984) (reviewing order denying access by way of petition for writ of mandamus, without deciding whether order was reviewable by way of direct appeal); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 660 (8th Cir. 1983) (without discussing question, court reviews order denying access by way of petition for writ of mandamus). That conflict does not merit this Court's review in the present case.

As the court of appeals pointed out, although the courts of appeals disagree over the precise source of their authority to review orders restricting public access, they agree that they have jurisdiction to review such orders. Pet. App. 8 ("In any event, all circuits that have considered the issue have found appellate jurisdiction to consider the issue under one doctrine or the other."). Petitioner identifies no specific respect in which this conflict leads to a lack of uniformity that merits the attention of this Court.

5. Finally, petitioner argues that the Court should grant review to "clarify the standard of review to be

used" when a court of appeals reviews a sealing order. Pet. 27. Whatever the source of the courts of appeals' jurisdiction, petitioner contends, the First Amendment requires that the court of appeals exercise plenary review when considering such orders. *Id.* at 27-28. Because the opinion of the court of appeals in the present case, read as a whole, demonstrates that the proper disposition of the case would not be affected by a ruling in petitioner's favor on this issue, further review is not warranted.

As petitioner points out (Pet. 27), the court of appeals in the present case indicated that it was applying an abuse of discretion standard when it reviewed the orders of the district court. Pet. App. 10, 19. Nevertheless, the opinion, taken as a whole, clearly indicates that the court of appeals conducted a searching review of the orders of the district court, and that the court of appeals' disposition of the case did not depend on the standard of review applied. See *id.* at 17 (sealing portions of the motion to suppress "was necessary," and access to the redacted material was not needed for a full understanding of the district court's ruling; the order sealing portions of the suppression motion and attached exhibits "was consistent with any First Amendment or common law rights of access"), 19 (district court "narrowly tailored [its] orders to the compelling interests at stake"), 21 ("Based on [*in camera*] review [of the sealed and redacted material,] we conclude that the district court properly sealed only those portions of the documents at issue necessary to protect, respectively, the integrity of suppressed evidence and [respondents'] ability to argue effectively that separate trials were warranted.").

Because a ruling in petitioner's favor on the question of the proper standard of review would not affect the disposition of the case, this case is not an appropriate vehicle for considering that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

SEAN CONNELLY
Special Assistant to the Attorney General

DOUGLAS N. LETTER
JEFFRICA JENKINS LEE
Attorneys

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